BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN R. WOLLENBERG Claimant VS.	)	
	)	Docket No. 184,428
MARLEY COOLING TOWER COMPANY Respondent AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY COMPANY Insurance Carrier	)	

ORDER

Respondent appeals from a January 11, 1995 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on April 18, 1995.

APPEARANCES

Claimant appeared by and through his attorney Robert W. Harris of Kansas City, Kansas. Respondent and its insurance carrier appeared by and through their attorney Mark Beam-Ward of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent asks the Appeals Board to review the findings and conclusions by the Administrative Law Judge relating to the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties the Appeals Board finds and concludes the Award by the Administrative Law Judge should be modified.

The Administrative Law Judge found claimant entitled to benefits based upon a forty and two-thirds percent (40.66%) permanent partial general disability and the Appeals Board finds claimant is entitled to benefits for a thirty-two percent (32%) permanent partial general disability.

In April 1993 respondent eliminated claimant's job as a mold maker and transferred him to a position as a grinder finisher. In the new position he operated saws, grinders and drills. He, thereafter, began experiencing numbness in his hands and was awakened in the middle of the night when his hands felt like they were on fire. He sought treatment from his family doctor and reported the problem to his supervisor. Respondent referred claimant to the Family EmergiCenter for treatment.

At the Family EmergiCenter, Dr. Cowles provided treatment for claimant from July 9, 1993 through August 25, 1993. Although Dr. Cowles found possible carpal tunnel syndrome, claimant's symptoms improved and Dr. Cowles released claimant to return to work in August 1993. He released claimant to return to his regular duties but, at the same time, recommended claimant exercise caution in the use of his hands. Dr. Cowles testified that at the time he felt claimant's symptoms would resolve.

Claimant did, in fact, resume his duties as a grinder finisher on a trial basis. However, claimant's symptoms returned and worsened. By September 22, 1993 it became apparent claimant could no longer continue working as a grinder finisher. Respondent then offered claimant a position as a general helper at a reduced rate of pay. Claimant declined the offer and took a voluntary layoff.

The parties have stipulated, in accordance with Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), that the date of claimant's accident is September 22, 1993. Accordingly, substantive changes to the Kansas Workers Compensation Act effective July 1, 1993 (hereinafter "new act"), govern the determination of benefits in his case. The "new act" defines permanent partial general disability as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (K.S.A. 44-510e).

The Administrative Law Judge applied the "new act" definitions and method. On the basis of a list of job tasks prepared by Mr. Richard Santner and the opinion of Dr. Koprivica, the Administrative Law Judge concluded claimant's injury resulted in a sixty-six and two-thirds percent (66.67%) loss of ability to perform the job tasks he had performed during the fifteen (15) years preceding his accident. To determine the wage loss component, the Administrative Law Judge compared claimant's pre-injury wage to $8.14 per hour the respondent offered post-injury. The Administrative Law Judge imputed the

$8.14 to claimant on the basis of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied March 21, 1995, a decision in which the Court of Appeals declared that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proffered job the worker has the ability to perform. The Administrative Law Judge, therefore, found a thirteen and four tenths percent (13.4%) wage loss. As required by K.S.A. 44-510e, the Administrative Law Judge averaged the task loss and wage loss to arrive at a forty and two-thirds percent (40.66%) work disability.

Respondent first challenges the conclusion claimant has a sixty-six and two-thirds percent (66.67%) loss of ability to perform task. Respondent urges the Appeals Board to rely on the opinions of the treating physician, Dr. Cowles, not those of Dr. Koprivica. Dr. Cowles testified that at the time he released claimant, he felt claimant could return to his regular duties without restrictions. He, nevertheless, encouraged claimant to exercise caution in the use of his hands. The evidence establishes that claimant did return to his regular duties and the condition worsened. Dr. Cowles did not see claimant after the condition worsened. For that reason the Appeals Board does not consider Dr. Cowles conclusions to be an appropriate basis for measuring claimant's disability.

Respondent also argues that the Administrative Law Judge relied upon an opinion from Dr. Koprivica which Dr. Koprivica subsequently modified in his deposition testimony. Dr. Koprivica examined claimant and determined what he considered to be appropriate restrictions. Specifically, he recommended claimant:

> " . . . avoid repetitive grasping, forceful sustained grasping, repetitive pinching or forceful sustained pinching, repetitive flexion and extension of the wrist, repetitive ulnar deviation of the wrist, sustained postures of the wrist of this sort or use any type of air-driven tools which would expose his upper extremities to vibration." (Koprivica deposition exhibit #1).

Dr. Koprivica applied these restrictions to a list of job tasks from claimant's fifteen (15) year work history. Dr. Koprivica initially indicated he felt claimant has lost the ability to perform sixty-six and two-thirds percent (66.67%) of the tasks. The Administrative Law Judge adopted this opinion. This initial opinion by Dr. Koprivica appears, however, to have been an opinion that claimant lost the ability to perform sixty-six and two-thirds percent (66.67%) of the jobs rather than tasks. The initial opinion also failed to take into consideration claimant's previous work as a supervisor. When Dr. Koprivica adjusted his opinions, he concluded claimant could perform fifty percent (50%) of the tasks he had performed in his fifteen (15) year pre-accident work history. Because it is based on tasks and not jobs and because it includes the supervisory work, the Appeals Board considers this adjusted opinion more appropriate. The Appeals Board, therefore, finds claimant sustained a fifty percent (50%) loss of ability to perform tasks he had performed in his fifteen (15) years pre-injury job history.

Assessment of the extent of claimant's disability in this case requires that we determine whether the Administrative Law Judge appropriately applied the Foulk decision in determining the wage loss component under the “new act.” The analysis requires that we differentiate between: (1) the presumption of no work disability found in the old act (prior to July 1, 1993 hereinafter “old act”) for workers who return to work at a comparable wage; and (2) the wage loss component in the test for determining disability under the “new act.” The Foulk decision related to the presumption of no work disability under the “old act.” In this case, the Administrative Law Judge has extended the same rationale to the wage loss prong under the “new act” definition of work disability.

The “presumption” was replaced in the “new act” by a conclusive rule which eliminates work disability for claimants who return to work at a wage which is ninety percent (90%) or more of the pre-injury wage. K.S.A. 44-510e. In the present case, as in Foulk, claimant declined the position offered by respondent. However, here the offered job would have paid less than ninety percent (90%) of the pre-injury wage. Therefore, even

if the Foulk rationale were applied here, it would not act as a complete bar to an award of work disability.

There remains for consideration, however, the Administrative Law Judge's application of the Foulk rationale to the wage loss prong under the "new act." In Foulk, the Court of Appeals considered the following language relating to the presumption of no work disability in K.S.A. 1988 Supp. 44-510e(a):

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added)

The Court of Appeals concluded that a literal reading of the language would offer an unacceptable reward for refusing to work. Considering the result contrary to the intent of the Workers Compensation Act, the Court of Appeals concluded that the plain language should not be given its normal and natural meaning. The Court stated that the presumption should, therefore, apply to a worker who refused to attempt a proffered job at a comparable wage when that job is within the worker's ability.

Although the present case involves a wage loss component of work disability, the concepts are similar. Both involve a comparison of pre- and post-injury wage factors. The language at issue here, in the current K.S.A. 44-510e, defines the wage component of work disability under the "new act" as follows:

> " . . . expressed as a percentage, . . . the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury." (Emphasis added)

As in Foulk, the plain and ordinary meaning of the language concerns only what the worker does, in fact, earn after the injury, not what he or she could earn. However, the policy considerations cited in Foulk also apply here. If the language is given its plain and ordinary meaning, any worker who does not work after the accident, regardless of the reason, would be entitled to a hundred percent (100%) wage loss factor and a minimum of a fifty percent (50%) work disability (100% wage loss factor averaged together with a 0% loss of ability to perform tasks). Similarity in the concepts and policy considerations leads the Appeals Board to conclude that the rules applied in the Foulk decision to construction of the presumption of no work disability should also apply to the wage component of the work disability test.

Nothing in the Foulk decision suggests it should be limited to the "old act." However, differences between the "old" and "new act" definitions of work disability raise additional questions. Prior to the amendments effective July 1, 1993 the wage loss component was expressly keyed to claimant's "ability" to earn comparable wages. In the "new act" the legislature eliminated reference to the worker's "ability" and substituted reference to what the worker "is earning." We do not intend to read back into the statute the language the legislature recently deleted. The Appeals Board would limit application of the Foulk decision, in cases involving the wage component under the "new act," to circumstances where the claimant has refused employment which the claimant has the ability to perform or voluntarily remove himself from the labor market without good reason. We understand the legislative change in the "new act," on the other hand, to eliminate use of theoretical "ability" as established by the projections of vocational experts; expert opinions which have been the commonly accepted means of proving work disability under the "old act." This construction attempts to follow the import of the Foulk decision and at the same time give effect to the apparent legislative intent to rely upon more concrete factors to measure work disability.

The Appeals Board also concludes that the specific facts of this case warrant attribution of the $8.14 per hour wage to the claimant in computing work disability. When claimant first had problems performing his duties as a finisher, respondent placed him in a position as a general helper and initially left his pay rate at that of a finisher. It was during this period that his symptoms subsided to the point Dr. Cowles felt claimant could return to the work as a finisher. When claimant returned to work as a finisher the symptoms returned and worsened. Respondent then offered claimant the opportunity to return to work as a general helper but told claimant his pay would be reduced to that of a general helper, $8.14 per hour. The evidence indicates respondent regularly employed a number of general helpers who performed miscellaneous duties which included such things as painting, janitorial work, yard cleaning and sorting chores. Mr. Gromer, the plant manager, prepared a list of tasks which would normally be done by a general helper. The list was reviewed by a physician to determine which, if any, claimant should not be assigned. Some, including painting, were eliminated. The Appeals Board finds respondent intended to and was willing to modify the position of general helper to accommodate the claimant's restrictions.

Although claimant gave respondent no reason for declining the offer, claimant testified to three (3) reasons for his decision. He stated that his hands were hurting and he knew he could not swing the grass whip or paint; tasks general helpers routinely performed. He also stated that he did not want a cut in pay. Finally, he indicated that the drive to the job was an eighty-five (85) mile round trip and he felt he could obtain work closer to home at a comparable rate of pay.

Of the three reasons given, only the belief that he might not be able to perform the job raises legitimate concerns about imputing the wage. The pay difference leaves a wage loss factor to be considered in the work disability. The travel distance was the same claimant had been traveling prior to the injury. However, the wage would not logically be imputed to a claimant under the Foulk rationale where the claimant declines a job because of a reasonable good-faith belief that he or she cannot perform the job duties. The record in this case indicates claimant could have performed the job, in part, because respondent would have been willing to accommodate the restrictions. Although respondent's representatives did not recall expressly advising claimant that they would accommodate the restrictions, they stated they believed claimant knew they would do so. Although the employer's express statement of willingness to accommodate may often be significant, the record as a whole, in this case, suggests claimant most likely did understand respondent would accommodate his restriction. Respondent had made previous attempts to find work which claimant could perform, including work on a trial basis at other jobs. Claimant was advised the offer for work as a general helper was so that he could avoid the repetitive hand activities. Without explanation claimant declined the offer. Under these circumstances it appears most likely claimant understood respondent's intention and that concern about the job duties did not play a significant role in his decision. On the basis of the Foulk decision, the Appeals Board, therefore, finds it appropriate to impute to the claimant the $8.14 an hour wage and finds claimant sustained a fourteen percent (14%) wage loss. The percentage differs slightly from that found by the Administrative Law Judge because the Appeals Board used $9.47 per hour as the pre-injury wage as testified to by Mr. Gromer.

Pursuant to K.S.A. 44-510e, the loss of ability to perform tasks and the wage loss are to be averaged together to arrive at the work disability. In this case, the average of a fifty percent (50%) loss of ability to perform tasks and a fourteen percent (14%) loss of ability results in a thirty-two percent (32%) work disability which the Appeals Board finds to be the appropriate basis for the award in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated January 11, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, John R. Wollenberg, and against the respondent, Marley Cooling Tower Company, and its insurance company, Hartford Accident & Indemnity Company, for an accidental injury sustained to and including September 22, 1993 and based upon an average weekly wage of $378.80 for 132.80 weeks of permanent partial general disability at the rate of $252.55 per week or $33,538.64 for a 32% permanent partial general body impairment of function.

As of September 29, 1995, there is due and owing claimant 105.29 weeks of permanent partial disability compensation at the rate of $252.55 per week in the sum of $26,590.99, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $6,947.65 is to be paid for 27.51 weeks at the rate of $252.55 per week, until fully paid or further order of the Director.

Future medical treatment for the claimant for injuries compensated in this proceeding may be awarded upon a proper application and a hearing upon notice to all parties.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with his counsel is hereby approved.

Costs of transcripts in the record are taxed against respondent and its insurance company as follows:

Hostetler & Associates, Inc.	$229.25
Gene Dolginoff Associates, Ltd.	$334.00

IT IS SO ORDERED.

Dated this ___ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert W. Harris, Kansas City, Kansas
Mark Beam-Ward, Overland Park, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director